STATE OF MICHIGAN

COURT OF APPEALS

RELIABLEONE STAFFING SERVICES, L.L.C., Plaintiff-Appellant,	UNPUBLISHED July 1, 2004
v	No. 245645 Oakland Circuit Court
STAFFSOFT CORPORATION, Defendant-Appellee.	LC No. 02-042141-CK

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order dismissing this case for lack of jurisdiction. We reverse and remand for further proceedings.

I. Facts and Procedure

Defendant submitted a proposal for plaintiff to buy defendant's software, which defendant claimed could perform certain functions.[1] Based on defendant's representations, plaintiff executed a "Confirmation of Order Agreement" (COA) expressing the intent to purchase defendant's software. Plaintiff later filed a complaint against defendant for fraudulent inducement, breach of contract, violations of the Michigan Consumer Protection Act, MCL 445.901, *et. seq.*, and unjust enrichment, alleging that defendant's CEO misrepresented the capacities of the software.

Defendant filed a motion to dismiss for lack of jurisdiction, arguing that the "End User License Agreement" (EULA) provided that any dispute arising from the agreement would be adjudicated in Harris County, Texas. Defendant claimed that plaintiff agreed to the EULA when plaintiff entered into the COA. Defendant further argued that plaintiff accepted the EULA by clicking on an "accept" icon during the installation of the software. Plaintiff countered that it did not agree to the EULA by signing the COA, and that it did not accept the terms of the EULA in the course of installing any software.

[1] Details about the software and its intended use are not relevant to the issues on appeal.

The trial court granted summary disposition for defendant pursuant to MCR 2.116(C)(4). The trial court concluded that plaintiff accepted the terms of the EULA when plaintiff entered into the COA. Thus, the trial court concluded that jurisdiction over this case rested in Harris County, Texas.

II. Analysis

A. Standard of Review

We review de novo motions brought under MCR 2.116(C)(4). *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000). "When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Id.*

B. Discussion

Plaintiff argues that the trial court erred in concluding that it agreed to the EULA by signing the COA. We agree. The interpretation of a contract is a question of law that is reviewed de novo. *Schmalfeldt v North Pointe Ins Co*, 469 Mich 422, 426; 670 NW2d 651 (2003). The main goal of contract interpretation is to enforce the parties' intent. *Burkhardt v Bailey*, 260 Mich App 636, 656; ___ NW2d ___ (2004). "[W]hen the language of a document is clear and unambiguous, interpretation is limited to the actual words used . . . ." *Id.* Rewriting unambiguous contractual language is "contrary to the bedrock principle of American contract law that parties are free to contract as they see fit . . . ." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51; 664 NW2d 776 (2003).

Here, the unambiguous language of the COA did not incorporate or require plaintiff to agree to the terms of the EULA. The COA states, "The End User License Agreement (EULA) should be read in conjuction [sic] with the terms of this license." This language only sets forth a suggestion ("should be") that the EULA be read in conjunction with the COA. It does not state that the EULA is incorporated into the COA, or that plaintiff's agreement to the COA binds it to the EULA. Furthermore, the COA states, "Your use of the system, by installing it on a computer or otherwise, indicates your acceptance of all the terms and conditions of this license." "This license" only refers to the COA, the instrument plaintiff signed. Nothing in this sentence suggests that the EULA or anything beyond the COA is included in "this license." The COA does not include any other language that could bind plaintiff to the EULA. Simply put, plaintiff did not agree to the EULA by signing the COA. The trial court erred in concluding that plaintiff was bound to the forum selection clause of the EULA.

Defendant also argues that even if the COA did not incorporate the terms of the EULA, plaintiff nonetheless accepted the terms of the EULA when plaintiff loaded defendant's software in plaintiff's computer system. "Whether an offer has been accepted and a contract formed involves a factual determination." *In re Costs & Attorney Fees*, 250 Mich App 89, 97; 645 NW2d 697 (2002); see also 17B CJS *Contracts* § 771 (1999). However, whether a court has subject matter jurisdiction is a question of law for the court. *Specht v Citizens Ins Co*, 234 Mich App 292, 294; 593 NW2d 670 (1999).

In the present case, there is a question of fact regarding whether plaintiff agreed to the EULA by clicking on an "accept" icon while loading defendant's software in plaintiff's computer system. Defendant maintains that plaintiff clicked on an "accept" icon and thus accepted the EULA, while plaintiff contends that no person authorized to act on behalf of plaintiff accepted the terms of the EULA during the installation of defendant's software. The litigants offer conflicting affidavits in support of their respective positions. In light of such evidence, reasonable minds could differ regarding whether plaintiff agreed to the EULA. Consequently, dismissal based on this ground is inappropriate, because there is a genuine issue of material fact whether plaintiff accepted the EULA in the process of installing defendant's software. Since the trial court did not address this issue, we remand this case for further proceedings consistent with this opinion.

On remand, the trial court shall resolve the question whether plaintiff accepted the EULA and, consequently, whether Michigan courts have jurisdiction over this case. This issue involves not only a question of fact, but it also involves an underlying legal question of subject matter jurisdiction. Whether jurisdiction is proper in Texas or Michigan depends on whether plaintiff agreed to the forum selection clause in the EULA. Since a question of fact is determinative of whether jurisdiction is proper in Michigan, there exists the underlying issue whether a jury or judge should decide this question on remand.[2]

In *Offerdahl v Silverstein*, 224 Mich App 417, 420; 569 NW2d 834 (1997), this Court determined that Michigan had jurisdiction over a threshold question of contract formation where the contract in question contained a forum selection clause naming Illinois as the venue for disputes. In *Offerdahl*, *supra*, this Court held that a forum selection clause does not apply until the initial factual question of contract formation is decided. *Id*. Thus, this Court remanded the case for a determination by the trial court whether the plaintiffs were bound by the contract. *Id*. at 420-421. We conclude that, under *Offerdahl*, *supra*, when a factual dispute is determinative of an underlying jurisdiction question, the court should determine that question of fact.[3] On

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[2] If a factfinder were to find that plaintiff agreed to the EULA, then jurisdiction would not be proper in Michigan, because the EULA vests jurisdiction only in Harris County, Texas. Neither the trial court nor the parties have addressed whether a judge or jury resolves a question of fact when resolution of that question is determinative of an underlying and preliminary question of law, relating to the establishment of jurisdiction.

[3] The Utah Supreme Court reached a similar conclusion in *Henrie v Rocky Mountain Packing Corp*, 196 P2d 487 (Utah, 1948). In that case, a sixteen-year-old employee of a canning plant was fatally injured on the job. *Id.* at 488. The plaintiff, the boy's father, brought a wrongful death suit against the plant and argued that the case did not fall under worker's compensation laws, because his son was illegally employed under a Utah statute. *Id.* Following a trial court verdict for the plaintiff, the Utah Supreme Court reversed, holding that the boy was a legal employee under the statute. *Id.* at 491. In a petition for rehearing, the plaintiff argued that he was improperly deprived of a jury trial on the legal employment issue. *Henrie v Rocky Mountain Packing Corp*, 202 P2d 727 (Utah, 1949). The Utah Supreme Court denied the plaintiff's petition, holding that a factual dispute over whether the boy was a legal employee was best left to

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remand, the trial court should allow the parties to conduct ample discovery and then preside over an evidentiary hearing to determine whether plaintiff accepted the EULA.

Finally, plaintiff raises two additional arguments for the first time on appeal. First, plaintiff claims that a forum selection clause cannot preclude litigation in this suit because of its claim for fraudulent inducement. Second, plaintiff argues in its reply brief that, even if the forum selection clause is applicable, it does not necessarily bar litigation of this suit in Michigan. Issues raised for the first time on appeal are not generally subject to review. *Booth Newspapers, Inc v Univ of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).[4] Additionally, a reply brief "must be confined to rebuttal of the arguments" in the brief to which it is responding. MCR 7.212(G). We decline to address plaintiff's remaining issues because they were not properly preserved for review, and there are no exceptional circumstances that would cause us to deviate from this rule.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray

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judicial determination because of the presence of an underlying jurisdiction question. *Id.* Since the fact question was determinative of jurisdiction, the court appropriately decided it. *Id.* at 729.

[4] The circumstances must be "exceptional" for the Court to deviate from this rule. *Booth, supra* at 234 n 23.